Supreme Court, U.S.
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92-614

No. ____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1992

CSX TRANSPORTATION, INC.,

Petitioner,

v.

LEONARD F. BARKER, JR., *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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October 7, 1992

QUESTIONS PRESENTED

1. Did the district court and court of appeals have jurisdiction to interpret the requirements of 45 U.S.C. § 797c, when Congress required that "any dispute" arising under Section 797c be resolved by final and binding arbitration by the National Railroad Adjustment Board, not by courts?

2. Did the court of appeals have jurisdiction to review a ruling of the Railroad Retirement Board applying the Northeast Rail Service Act, when Congress provided that exclusive jurisdiction to review such rulings was in the Regional Rail Reorganization Court, a three-judge court?

RULE 29.1 LIST

Pursuant to United States Supreme Court Rule 29.1, Petitioner CSX Transportation, Inc. ("CSXT") declares that it is a wholly-owned subsidiary of CSX Corporation ("CSX").*/ The subsidiaries and affiliates of CSXT or CSX, other than those wholly owned by them, are:

Allegheny and Western Railway Company;
The Baltimore and Cumberland Valley Rail Road Extension Company;
The Central Rail Road Company of South Carolina;
The Cincinnati Inter Terminal Railroad Company;
The Cleveland Terminal and Valley Railroad Company;
Dayton and Michigan Railroad Company;
The Home Avenue Railroad Company; and
Mid-Allegheny Corporation.

LIST OF PARTIES

The parties to the proceeding below were Petitioner CSX Transportation, Inc., defendant below; Respondents Leonard F. Barker, Jr., Kenneth D. Beaver, Carl J. Cannon, William J. Charles, Dyke M. Christian, Jeffrey L. Darwish, Isaac M. Glover,

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*/ On August 27, 1992, CSXT filed an Application for Extension of Time to File Petition for Certiorari to the United States Court of Appeals for the Sixth Circuit. The subsidiaries and affiliates of CSXT and CSX listed in footnote 1 of the application were inaccurate.

Steven L. Higginbotham, James E. Kellie, Elbert Reed, Timothy L. Reedy, and Robert J. Faunce, plaintiffs below. The United Transportation Union ("UTU") was also a defendant below. In compliance with Supreme Court Rules 12.2 and 12.4, petitioner has listed UTU as a respondent herein.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CSX Transportation, Inc. ("CSXT") respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit, entered on March 27, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 959 F.2d 1361 and is reprinted in the Appendix ("App.") hereto at 1a-23a. The United States District

Court for the Eastern District of Michigan did not issue a written opinion. Excerpts from the transcript of hearing before the district court on the defendants' motions to dismiss the plaintiffs' complaint are reprinted in the Appendix hereto at 24a-27a. The district court's orders dismissing plaintiffs' complaint are reprinted in the Appendix hereto at 28a-31a.

JURISDICTION

Federal jurisdiction in the courts below was invoked under 28 U.S.C. §§ 1291 and 1331. On October 22, 1990, the district court granted CSXT's and the United Transportation Union's ("UTU") motions to dismiss plaintiffs' complaint. App. at 24a-31a. On March 27, 1992, the Sixth Circuit affirmed the dismissal of the complaint against UTU, but reversed the court's dismissal of the complaint against CSXT. *See* App. at 1a-20a. On June 9, 1992, the Sixth Circuit denied CSXT's Petition for Rehearing and Suggestion for Rehearing *En Banc*. *See* App. at 32a-33a. On September 1, 1992, this Court extended the time period within which CSXT could file a petition for certiorari, to and including October 7, 1992. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This appeal involves Sections 797c and 1105 of the Northeast Rail Service Act ("NERSA"), 45 U.S.C. §§ 797c, 1105, and Section 3 of the Railway Labor Act ("RLA"), 45 U.S.C. § 153. These statutory provisions are reprinted in the Appendix hereto at 21a-23a and 34a-47a.

STATEMENT OF THE CASE

A. The Employees' Claims Under Section 797c

This case involves claims by twelve CSXT employees that their seniority should be elevated over fellow CSXT employees with more seniority, based on an expired statute that was designed to match employees displaced from their railroad employer with employment vacancies on other railroads. These twelve employees were on furlough status from CSXT or one of its predecessors at various times between 1979 and the present.1/ An employee on furlough status is still an employee of the railroad,2/ but is cur-

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1/ The employees sued Chesapeake & Ohio Railway ("C&O"), as well as CSXT. C&O is a predecessor of CSXT.

2/ *See Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456, 460-61 (D.C. Cir.), *cert. denied*, 493 U.S. 974 (1989); *Nashville, C. & St. L. Ry. v. Railway Employees' Dep't*, 93 F.2d 340, 343 (6th Cir. 1937), *cert denied*, 303 U.S. 649 (1938).

rently unable to hold a position through the exercise of seniority rights, typically because of a downturn in the carrier's business. The employee is subject to recall when the carrier's business increases.

The employees alleged that, between 1981 and 1987, CSXT violated Section 797c of NERSA, which required railroads to file with the Railroad Retirement Board ("RRB") "a notice of vacancy with respect to any position for which the railroad intends to accept applications from persons other than current employees of that carrier."3/ 45 U.S.C. § 797c(c)(1). The employees claimed that, because CSXT failed to report certain vacancies to the RRB, even though the vacancies were in seniority districts on CSXT other than where they had seniority rights under their collective bargaining agreements, they lost the opportunity to apply for employment with their own carrier in these other seniority dis-

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3/ Four of the employees originally filed suit *pro se* against C&O on January 3, 1987, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* Subsequently, at the urging of the district court, the plaintiffs hired an attorney who filed an amended complaint on their behalf on November 30, 1987, which lacked a cause of action based on Title VII. Ten additional plaintiffs were listed in the amended complaint. The claims of two of the employees were dismissed and no appeal was made on their behalf.

tricts. They claimed loss of income and seniority rights and asked the district court to order CSXT to restore them to their "proper" position on the carrier's seniority roster and award them money damages. App. at 2a.

Section 797c, the statutory section under which the employees brought suit, was part of NERSA, which primarily related to continuing efforts to make the then government-owned Consolidated Rail Corporation ("Conrail") profitable and the effects of those efforts on Conrail employees. *See* 45 U.S.C. §§ 797, 797c. Section 797c imposed an industry-wide obligation on railroads to report certain job vacancies to the RRB, which was to maintain a Central Register of unemployed rail workers. The primary purpose of the Central Register was to facilitate a preferential hiring right granted by Congress, in Section 797b of NERSA, to employees of Conrail and two bankrupt railroads, the Milwaukee Road and the Rock Island, who lost their jobs as a result of efforts to reorganize these three railroads. While Congress' primary concern here was matching vacancies with employees who had lost employment with these three railroads, Section 797c also provided that the RRB assist unemployed rail

workers of any carrier to find work at another carrier. 45 U.S.C. § 797c(a)-(g).

Congress did not provide for any judicial enforcement or interpretation of Section 797c. An employee who had a dispute with a railroad regarding its compliance with Section 797c was required first to petition the RRB. If the RRB concluded that the employee's rights under Section 797c "may have been violated," Congress then required that the dispute be resolved by final and binding arbitration, by incorporating the dispute resolution procedures contained in Section 3 of the RLA, 45 U.S.C. § 153. *See* 45 U.S.C. § 797c(g)(1)-(3). Section 3 of the RLA, which deals with so-called "minor disputes" under that Act,4/ requires that disputes subject to it be resolved by binding arbitration by the National Railroad Adjustment Board ("NRAB") or another adjustment board established by the parties. Courts have no jurisdiction over matters within the exclusive jurisdiction of the NRAB, which is an administrative tribunal, expert in railroad

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4/ A "minor dispute" is a disagreement over the interpretation or application of collective bargaining agreements or past practices under those agreements, which give rise to implied agreements. *See, e.g., Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 303-04 (1989).

labor matters. *See Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 303-04 (1989) ("*Conrail*"). In addition to these arbitration procedures, the statute empowered the RRB to assess civil penalties for non-compliance with Section 797c. *See* 45 U.S.C § 797c(c)(2).

Congress intended the requirements of Section 797c to be temporary. They expired by their own terms on August 13, 1987. *Id.* § 797c(f).

Despite the mandatory dispute resolution procedures contained in Section 797c(g), only one of the twelve plaintiffs ever petitioned the RRB regarding CSXT's alleged failure to provide notice of vacancies before the law sunsetted. App. at 3a-4a. The fact that none of the other employees filed timely petitions with the RRB as required by the statute was undisputed. After initially questioning whether Section 797c was applicable to a CSXT employee, the RRB investigated the one timely dispute and, on August 11, 1987, two days before expiration of 797c, the RRB advised the employee and CSXT that the railroad may have violated the job vacancy reporting requirement of Section 797c. The RRB also concluded that the employee could progress his

statutory grievance by resorting to the mandatory arbitration procedures contained in Section 797c. *Id.* Despite being advised of that conclusion, the employee never initiated a grievance as required by RLA Section 3, First(i), which was incorporated by Section 797c(g)(3). Because the other employees waited until after Section 797c expired, the RRB never investigated their allegations. The RRB informed them that its authority under the statute lapsed when the statute expired, and that they had to proceed on their own.

B. District Court Dismisses The Employees' Complaint For Lack Of Subject Matter Jurisdiction

Instead of following the mandatory dispute resolution procedures of Section 797c(g), the employees filed suit against CSXT and UTU, their collective bargaining representative, in federal district court. In addition to their allegations against CSXT,5/ the employees claimed that UTU breached its duty of fair representation ("DFR") by failing to pursue grievances regarding CSXT's alleged failure to report vacancies to the RRB. App. at 3a.

5/ The employees also sued CSXT under a state law breach of contract theory.

On October 22, 1990, the district court dismissed plaintiffs' claim against their union on the basis that their DFR action was barred by the applicable statute of limitations. *Id.* at 27a. With regard to CSXT's motion, the court ruled that it lacked subject matter jurisdiction over the employees' Section 797c claims, stating that:

> the statute expressly requires that resolution of any displaced [sic] disputes relating to reinstatement be subject to arbitration. And this Court lacks subject matter jurisdiction to do anything for these persons regardless of who they are or what railroad, how they were displaced. This Court is simply without jurisdiction in the premises.

Id. at 26a-27a.6/

Alternatively, the court ruled that Section 797c did not provide rights for the employees, because it was designed to protect employees of Conrail and other specific railroads, *i.e.*, the Milwaukee Road and the Rock Island Railroad, who had been displaced by a railroad reorganization or bankruptcy. App. at 26a.

6/ In so ruling, the district court was in harmony with decisions of other courts regarding the exclusivity of the NRAB's jurisdiction under Section 797c(g). *See, e.g., Brotherhood of Locomotive Eng'rs v. Burlington N., Inc.*, 580 F. Supp. 797, 802-03 (D. Colo. 1984).

The district court entered an order dismissing the case on October 30, 1990. *Id.* at 28a-29a.

C. Sixth Circuit's Reversal Of District Court

On appeal, the employees argued that CSXT had an obligation to report vacancies to the RRB under the plain language of the statute and that, notwithstanding the availability of an arbitral forum, the district court's jurisdictional ruling left the employees without a "remedy" for the violation of their "rights." In addition, the employees again asserted that UTU breached its DFR. *Id.* at 6a.

The Sixth Circuit affirmed the district court's dismissal of the employees' DFR action, although on different grounds. *Id.* at 7a-9a. However, it reversed the court's ruling dismissing the complaint as to CSXT. Without citing any authority, the court ruled that Section 797c applied to carriers such as CSXT and that this section gave CSXT employees' "substantive rights." *Id.* at 14a. The court interpreted Section 797c as providing the employees with the right to maintain actions to enforce their "rights" under that section. The court went on to state that the employees

needed a forum within which to remedy the violation of those "rights." *Id.* at 14a-16a.

Contrary to the RRB's determination, the court found that the Board had the authority and the duty to investigate the employees' allegations and that it erred in not doing so. *Id.* at 16a. The Sixth Circuit then concluded that, in effect, the employees' dispute was not with CSXT, but with the RRB. Even though the RRB was not named as a defendant and was not before the court, the Sixth Circuit reformulated the issue for decision as involving "one narrow issue . . . on plaintiffs' 797c claim: were the plaintiffs entitled to have the RRB determine their rights may have been violated." *Id.* at 17a. The Sixth Circuit then proceeded to answer that question in the affirmative, in the process stating that the district court had general federal question jurisdiction under 28 U.S.C. § 1331. App. at 16a. The expiration of Section 797c did not deter the Sixth Circuit from discovering new substantive rights. The appellate court found that the general savings clause in 1 U.S.C. § 109 operated to preserve the employees' "rights" under Section 797c and their ability to enforce those "rights." App. at 14a-15a. Accordingly, it reversed

the district court's dismissal of their complaint. Because, in the Sixth Circuit's view, the RRB shirked its obligation to the employees, the court found the employees could proceed directly in district court against the carrier and then arbitrate before the NRAB. *Id.* at 18a-19a.

REASONS FOR GRANTING THE WRIT

This case warrants Supreme Court review, because the Sixth Circuit's decision is in direct and irreconcilable conflict with the express statutory language and long-standing precedents of this Court, which unequivocally provide that courts are without subject matter jurisdiction over grievances between railroads and railroad employees. Congress deliberately decided that "any dispute" arising under Section 797c would be subject to the exclusive jurisdiction of the NRAB, an arbitration tribunal expert in resolving railroad labor disputes. Because of the importance of keeping railroad labor disputes out of the courts, the decisions of this Court, including most recently *Conrail*, have strictly prohibited claims subject to the NRAB's jurisdiction from being brought in court. Yet here, the Sixth Circuit, by overturning the district court, permitted the plaintiffs to bring claims arising under

Section 797c to court. By addressing disputes involving the interpretation and application of Section 797c, the Sixth Circuit usurped the NRAB's exclusive jurisdiction to decide such disputes in the first instance. The Sixth Circuit's decision likewise conflicts with decisions of the NRAB that it has jurisdiction to resolve such disputes and determine whether employees have stated claims under the statute.

The Sixth Circuit's unilateral reformulation of the issue on appeal to be whether the RRB misinterpreted its authority under NERSA provides a second, independent basis for Supreme Court review. This issue, which surfaced for the first time in the Sixth Circuit's opinion, was committed by statute to the jurisdiction of the Regional Rail Reorganization Act Court, the special appellate court created to review administrative actions taken pursuant to NERSA. The Sixth Circuit's unauthorized exercise of jurisdiction over its self-created issue conflicts with the judicial review provisions of NERSA, well-settled principles regarding the limits of jurisdiction, and appellate decisions that the Special Court has exclusive jurisdiction to review administrative action under NERSA.

The Sixth Circuit's decision represents completely unsanctioned judicial decisionmaking, in conflict with the governing statute, controlling precedent of this Court, other appellate decisions, and decisions of the NRAB under NERSA. If unreviewed, the decision could lead to conflicting decisions by courts and the NRAB applying the requirements of NERSA, and disrupt labor relations in the railroad industry.

I. The Sixth Circuit's Exercise Of Jurisdiction Warrants Review Because It Is Contrary To The Statute And Supreme Court Precedent

The district court correctly dismissed the employees' complaint against CSXT for lack of subject matter jurisdiction, because Section 797c(g) unequivocally required that "*[a]ny* dispute . . . arising under this section" be submitted to binding arbitration by the NRAB. 45 U.S.C. § 797c(g) (emphasis added). The NRAB is an expert arbitration panel established to resolve disputes or grievances arising from the interpretation or application of railroad collective bargaining agreements. *See, e.g., Gunther v. San Diego & A.E. Ry.*, 382 U.S. 257, 261-62 (1965) (NRAB has "long experience and expertise").

In Section 797c, Congress extended the NRAB's jurisdiction to disputes arising from the interpretation or application of the job reporting requirements of the statute. It is well-settled that where

> Congress creates a statutory right, it clearly has the discretion, in defining that right, to . . . provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right.

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 83 (1982) (plurality opinion) (footnote omitted).7/ Congress did so here when it incorporated by reference the minor dispute procedures of the RLA into 797c(g). By such incorporation, Congress made a deliberate choice that "any dispute" between an employee and a railroad under Section 797c would, in effect, be treated like a minor dispute under the RLA, and be resolved by the NRAB, not by a court. In so doing, Congress sought to extend the NRAB's expertise in railroad labor issues, which this

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7/ *Cf. Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977) ("Congress has often created new statutory obligations, provided for civil penalties, and committed exclusively to an administrative agency the function of deciding whether a violation in fact occurred.").

Court has acknowledged in the past, *see Conrail*, 491 U.S. at 310-11, to labor disputes under Section 797b and 797c of NERSA. The disputes within the NRAB's exclusive jurisdiction under Section 797c included the very disputes the Sixth Circuit improperly considered -- whether the employees stated a claim, had standing under Section 797c, or had "substantive rights" under that Section, and whether the Savings Clause statute, 1 U.S.C. § 109, preserved employees' claims after the law sunsetted.8/

Having "conclude[d] that by the terms of Section 797c(g) the plaintiffs' claims are subject to arbitration under the provisions of 45 U.S.C. § 153," App. at 17a, the Sixth Circuit should have affirmed the district court. By reversing the district court and, in a case of first impression, finding subject matter jurisdiction over the merits of the employees' claims, the Sixth Circuit's decision conflicted with the plain language of Section 797c(g). The deci-

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8/ The Sixth Circuit's further rationale that the plaintiffs could not proceed to arbitrate their claims, absent court intervention, was also erroneous and contrary to the statute. App. at 15a & n.9. The employees had the ability unilaterally to initiate arbitration of their claims before the NRAB. *See* 45 U.S.C. § 153, First(i) ("the disputes may be referred . . . by either party to the appropriate division of the [NRAB]"); *Chicago & N. W. Transp. Co. v. Railway Labor Executives' Ass'n*, 908 F.2d 144, 158 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1073 (1991).

sion also conflicted with the many decisions of this Court, uniformly holding that courts have no jurisdiction over matters within the exclusive jurisdiction of the NRAB. *See, e.g., Conrail*, 491 U.S. at 303-04; *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 94 (1978) ("Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts."); *Slocum v. Delaware, L. & W. Ry.*, 339 U.S. 239, 244 (1950) ("This reasoning equally supports a denial of power in any court -- state as well as federal -- to invade the jurisdiction conferred on the Adjustment Board by the [RLA].").9/ Accordingly, the Sixth Circuit's decision is directly contrary to the statutory scheme and this Court's holdings regarding the primacy and exclusivity of the NRAB's jurisdiction.

Furthermore, the Sixth Circuit's conclusion is in conflict with decisions by the NRAB that it has exclusive jurisdiction to determine whether employees can state claims under Sections 797b and 797c. For example, in *Fischer v. Consolidated Rail Corp.*, N.R.A.B. 4th Div., Award No. 4419 (March 20, 1986), the first award by the

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9/ *Accord Atchison, T. & S. F. Ry. v. Buell*, 480 U.S. 557, 562 n.9 (1987); *Andrews v. Louisville & N. R.R.*, 406 U.S. 320 (1972); *Order of Ry. Conductors v. Pitney*, 326 U.S. 561, 566 (1946).

NRAB dealing with the preferential hiring right in 797b, the NRAB recognized that issues such as those considered by the Sixth Circuit were precisely the type of issues within its exclusive jurisdiction. App. at 48a-60a. *See also, e.g.*, *Alexander v. Iowa Interstate R.R.*, N.R.A.B. 2d Div., Award No. 11134 (Jan. 21, 1987) (applying requirements of Section 797c(g)).

The only way that an employee could legitimately initiate a federal court action against CSXT under Section 797c was if, after arbitration, CSXT refused to comply with an award rendered by the NRAB under Section 797c(g) or if the employee sought to vacate such an award. *See* 45 U.S.C. §§ 153, First(p), (q); *Andrews v. Louisville & N. R.R.*, 406 U.S. 320, 322-26 (1972). Other than that extremely limited area of judicial review, courts lack subject matter jurisdiction over disputes within the NRAB's exclusive jurisdiction.

Thus, because the employees had a mandatory and exclusive forum in which to resolve their claims, the Sixth Circuit erred in reversing the district court's dismissal for lack of subject matter jurisdiction. The Sixth Circuit's unsanctioned usurpation of the jurisdiction of the NRAB or other adjustment boards established

to resolve Section 797c claims interferes with the nationwide scheme of mandatory railroad arbitration by expert labor arbitrators established by Congress, and threatens conflicting results between the Sixth Circuit's decision and such adjustment boards.

II. The Sixth Circuit's Decision Warrants Review Because Its Review Of The RRB's Action Was Contrary To The Statute And Supreme Court Precedent

The "narrow issue" as framed by the Sixth Circuit -- "were the plaintiffs entitled to have the RRB determine whether their rights may have been violated" -- was purely the court's own invention. While the court proceeded to answer its own question, it never bothered independently to consider whether it had any jurisdictional basis to do so.10/ The Sixth Circuit merely justified its review of the RRB's supposedly erroneous interpretation of the statute by stating that, otherwise, the RRB's action would be unreviewable. App. at 15a-16a. In fact, Section 1105 of NERSA established exclusive appellate jurisdiction to review

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10/ This is contrary to the well-settled rule that "[t]he federal courts are under an independent obligation to examine their own jurisdiction . . . ." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990).

administrative action taken pursuant to NERSA in the Regional Rail Reorganization Court ("Special Court"). *See* 45 U.S.C. § 1105(a)(1).11/ In any such appellate action, the RRB, and not CSXT, should have been the respondent.

Like all federal courts, the Sixth Circuit is a court of limited jurisdiction, and Congress specifically excluded review of the RRB's administration of Section 797c from its jurisdiction. 45 U.S.C. § 1105. The Sixth Circuit's conclusion that the district court had general federal question jurisdiction to consider the RRB's interpretation of Section 797c was incorrect. In NERSA, Congress carved out an exception to general federal question jurisdiction, by establishing original and exclusive jurisdiction in the Special Court over all administrative actions taken pursuant to NERSA, except for claims involving Sections 797b or 797c over which the NRAB had exclusive jurisdiction. Thus, Congress specifically intended to deprive district courts of jurisdiction over claims involving administrative action under NERSA. If an employee had a dispute with the RRB's interpretation or

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11/ This particular jurisdictional argument was not raised below, because the issue was created *sua sponte* by the Sixth Circuit in its opinion. *See* App. at 17a.

administration of Section 797c, the employee was required to bring it before the special appellate court created by Congress to deal with issues relating to the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 701, *et seq.* ("3R Act").12/

The Sixth Circuit's exercise of jurisdiction was also contrary to the precedents of this Court which recognize Congress' right to limit jurisdiction. As this Court long ago explained:

> Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. *No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.*

Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) (emphasis added).13/ The Special Court, and *only* the Special Court, had

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12/ NERSA amended the 3R Act, which had created Conrail to "salvage" rail service in the midwest and northeast regions of the United States. *See* S. Rep. No. 601, 93d Cong., 1st Sess. 1, *reprinted in* 1973 U.S.C.C.A.N. 3242, 3242.

13/ *See also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988) (same); *Insurance Corp. of Ireland v. Compagnie de Bauxites*, 456 U.S. 694, 701 (1982) ("Jurisdiction of the lower federal courts is . . . limited to those subjects encompassed within a statutory grant of jurisdiction. . . . [T]his reflects the constitutional source of judicial power.").

original and exclusive jurisdiction to review actions of the RRB under NERSA. For example, in *Atkins v. Railroad Retirement Bd.*, 654 F. Supp. 685, 687 (Regional Rail Reorg. Ct. 1987), the Special Court held that employee challenges to the RRB's interpretation of 45 U.S.C. § 797(a)(1), which, like Section 797c, is found in Title VII of NERSA, were within the Special Court's exclusive jurisdiction.14/

14/ *See, e.g., Edison Elec. Inst. v. ICC*, 765 F.2d 210, 215 (D.C. Cir. 1985) (court lacked jurisdiction to review action of Interstate Commerce Commission taken pursuant to NERSA, because the Special Court has original and exclusive jurisdiction over "(1) cases relating to the enforcement, operation, execution, or interpretation of NERSA, and (2) cases relating to administrative action taken under NERSA"); *Leibitzke v. Consolidated Rail Corp.*, 532 F. Supp. 831, 832 (N.D. Ohio 1982) (plaintiffs' complaint raising issues regarding employee protection under Title VII of NERSA was within the "exclusive purview" of the Special Court, which "is composed of persons who are uniquely equipped to understand railroad problems as are members of the Railway Adjustment Board."); *see also Commonwealth v. ICC*, 535 F.2d 91, 93 (D.C. Cir. 1976) (while reviewing one issue raised in petition for review, court refused to consider other issue because it was within the original and exclusive jurisdiction of the Special Court), *cert. denied*, 429 U.S. 834 (1976); *Cayuga Indian Nation v. Cuomo*, 762 F. Supp. 30, 32-35 (N.D.N.Y. 1991) ("[T]he language of the [3R] Act . . . specifically discusses the appropriate forum for legal challenges to conveyances of land made under this Act. The Rail Act clearly states that the exclusive forum for challenges which seek to set aside or annul conveyances made under the Act is the Special Court.") (citation omitted).

Congress creates special courts to ensure coherent interpretation and application of a particular statutory scheme or issue. Because of the unique and specialized purposes of NERSA, Congress "intended that all litigation directly relating to the act be concentrated in the Special Court which has developed great expertise in Northeast rail matters." S. Rep. No. 101, 97th Cong., 1st Sess. 44 (1981); *see also* H.R. Rep. No. 153, 97th Cong., 1st Sess. 33 (1981) (Section 1152 "consolidates all civil actions arising out of the provisions of or the amendments made by this Act to the Special Court."). Because of this congressional intent, the Special Court has enjoined actions involving NERSA pending in federal district courts for fear a conflicting interpretation of the statute would emerge and disrupt the coherence of the statutory scheme. *See Steffen v. Consolidated Rail Corp.*, 690 F. Supp. 1054, 1056-57 & n.4 (Regional Rail Reorg. Ct. 1988). Here, the Sixth Circuit's unauthorized review of the RRB's application of NERSA conflicted with Congress' grant of appellate jurisdiction and appellate holdings that jurisdiction over such action was in the Special Court.

The Sixth Circuit not only invaded the Special Court's jurisdiction, as a remedy for its finding that the RRB erroneously interpreted Section 797c, the Sixth Circuit, in effect, rewrote Section 797c(g)(1)-(2) to simply eliminate, by judicial fiat, the statutory requirement that the plaintiffs, other than Faunce, first take their disputes to the RRB. App. at 18a. Nothing in the statute authorized the appellate court to impute the RRB's finding that one employee's rights may have been violated to other claimants.

Like the Sixth Circuit's usurpation of the NRAB's exclusive jurisdiction, its consideration of matters reserved by Congress for the Special Court deserves Supreme Court review. Otherwise, Congress' limitations on appellate jurisdiction and goal of uniform administration of a special statutory scheme will be undermined. The Sixth Circuit's action is also unfair to CSXT, because it may deprive it of arguments and defenses that it could otherwise have made to the RRB.

CONCLUSION

The unprecedented exercise of jurisdiction by the Sixth Circuit was clearly contrary to the statute and long-established

precedents of this Court. For the reasons in this petition, CSXT respectfully requests the Court to review the Sixth Circuit's decision.

Respectfully submitted,

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October 7, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD F. BARKER, JR.; KENNETH D. BEAVER; CARL J. CANNON; DYKE M. CHRISTIAN; JEFFREY L. DARWISH; ROBERT J. FAUNCE; ISAAC M. GLOVER; STEVEN L. HIGGINBOTHAM; JAMES E. KELLIE; ELBERT REED; WILLIAM J. CHARLES; and TIMOTHY L. REEDY, Plaintiffs-Appellants, v. CHESAPEAKE & OHIO RAILROAD, a/k/a CSX TRANSPORTATION, INC.; and UNITED TRANSPORTATION UNION, Defendants-Appellees.	ON APPEAL from the United States District Court for the Eastern District of Michigan Nos. 91-1260/1279

Decided and Filed March 27, 1992

Before: GUY, NORRIS, and BATCHELDER, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. This case on appeal presents claims of numerous plaintiffs that CSX Transportation violated provisions of section 704 of the Regional Rail Reorganization Act, resulting in damage to plaintiffs, and that their union breached its duty of fair representation in failing to assist plaintiffs in pursuing those claims. The district court dismissed plaintiffs' claims for breach of duty of fair representation and breach of contract against the United Transportation Union ("Union") as barred by the statute of limitations. We hold that plaintiffs failed to state a claim against the Union, and therefore will affirm the district court's dismissal of plaintiffs' claims against it. The district court also dismissed plaintiffs' claims against CSX Transportation (the "Railroad" or "CSX") for lack of subject matter jurisdiction over plaintiffs' claims or, alternatively, because plaintiffs lacked standing to bring their claims. For the reasons which follow, we will reverse the district court's dismissal of plaintiffs' claims against the Railroad and remand for further proceedings.

I. Background

Each of the plaintiffs is a former CSX employee who was furloughed by CSX between 1979 and 1980. Plaintiffs claim that during the years 1979 to 1984 CSX had vacancies available in positions for which they were qualified, but that CSX failed to report those vacancies to the Railroad Retirement Board ("RRB") in violation of Section 707 of the Regional Rail Reorganization Act, 45 U.S.C. § 797c. Plaintiffs claim that this failure to report vacancies caused them to lose opportunities to secure the available positions and thus lose wages and seniority rights.

Plaintiffs filed their initial complaint in this case on January 15, 1987. That pleading did not contain a claim that CSX had violated Section 797c. On August 13, 1987, Section 797c expired by operation of its sunsetting provision, subsection (f). Plaintiffs amended their complaint on November 30, 1987, to include a Section 797c claim against CSX and an unfair representation claim against the Union for its failure to assist the plaintiffs in prosecuting their 797c claims. On January 19, 1989, both the Union and CSX filed motions to dismiss or for summary judgment.

In response to the defendants' motions to dismiss or for summary judgment, plaintiffs proffered evidence that CSX failed to report numerous vacancies.1/ This evidence included plaintiffs' affidavits stating that they reported these failures to the RRB orally and in writing, but were told that the RRB did not have the power to help them, and copies of letters that they sent to the RRB both before and after the expiration of Section 797c.

Plaintiffs' evidence also shows that in February, 1982, Plaintiff Faunce sent a letter to the RRB requesting to know its enforcement authority in the area of furloughed workers. In response, the RRB stated that it did not have the jurisdiction to investigate railroads' hiring policies. Nevertheless, Faunce continued his efforts to have the RRB investigate his charges. The RRB eventually did perform an investigation, and on August 11, 1987, the RRB issued a letter to CSX, with a copy to Faunce, stating that CSX "may have violated Mr. Robert J. Faunce's rights under section 704 of the Regional Rail Reorganization Act [Section 797c]," because of the apparent failure to report vacancies in the areas of Russell,

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1/ The actual number of vacancies is not material to our discussion. The RRB eventually determined that at least 41 vacancies were not reported.

Kentucky, and Huntington, West Virginia, during 1981. Two days later the statute expired, and the RRB took the position that it had no power to investigate any of the other plaintiffs' claims any further.

Plaintiffs also assert that they went to their representatives in the United Transportation Union ("Union") but were never given assistance by the Union. This, plaintiffs claim, was a violation of the Union's duty of fair representation.

On October 22, 1990, the district court held a hearing at which he indicated he would grant both defendants' motions. In addition to providing reasons for granting the motion, the court also questioned the validity of a release that CSX had negotiated with plaintiff Robert Faunce. The judge directed CSX to submit a formal report on how the release was negotiated, and he indicated that he was not finished with the matter. However, it does not appear from the record that the district court made any further ruling on the validity of the release.

On October 30, 1990, the district court entered an Order granting the motions to dismiss and entered judgment for the defendants. In a February 14, 1991 Order, the district court granted plaintiffs' motion to alter or amend the judgment in order to clarify a portion of the October 30 Order. On February 20, 1991, the plaintiffs filed a notice of appeal, and on February 22, 1991, they filed an amended notice of appeal.

In granting the defendants' motions to dismiss, the district court did not rely on the evidence presented by the parties in support of their positions. Instead, the court made the determination that, as a matter of law, plaintiffs had failed to state a claim. We review these legal determinations *de novo*.

II. Discussion

Appellee CSX raises the threshold issue that this Court does not have jurisdiction over plaintiffs' claims against CSX because plaintiffs' notice of appeal is defective. Specifically, CSX argues that the notice only refers to the district court's amended Order of February 14, 1991, which pertains only to the Union, and does not indicate that plaintiffs are appealing from the October 30, 1990 Order dismissing their claims against CSX. We reject this argument. First, the amended Order has no existence independent of the original Order dismissing all of the claims. It refers specifically to the Order of October 30, 1990, and merely incorporates an amendment into that earlier Order. Second, the notice of appeal provided adequate notice to CSX that plaintiffs were appealing the dismissal of their claims against CSX, since it specifically designated CSX as a defendant.2/ In addition, it was the plaintiffs themselves who requested the amendment to the October 30, 1990 Order. It is illogical to assume that they would appeal only the Order which incorporated a change that they had requested. Therefore, this Court has jurisdiction to address plaintiffs' claims against CSX as well as those against the Union.

2/ The statutory note to Federal Rule of Appellate Procedure 3(c) states that several cases have held that "so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with." This Court's decision in *Drayton v. Jiffee Chem. Co.*, 591 F.2d 352 (6th Cir. 1978), is not to the contrary. In *Drayton*, the court held that it did not have jurisdiction to address plaintiffs' loss of society claim because the notice of appeal specifically limited itself to their claims for punitive damages and necessary services. 591 F.2d at 361 n. 10. In the present case, plaintiffs' notice of appeal specifically referenced the February 14, 1991 Order, which had no existence separate from the previous October 30, 1990 Order.

Four substantive issues are presented for our review in this matter. The first is whether the plaintiffs have stated any claim against the defendant Union. The second is whether the district court had subject matter jurisdiction to entertain the plaintiffs' Section 797c claims against CSX. The third is whether plaintiffs have standing to bring claims under Section 797c. The fourth and final issue is who should address plaintiffs' claims upon remand.

A. The Union

Plaintiffs assert that the Union breached its duty of fair representation by failing to advise them and refusing to assist them in perfecting their respective Section 797c claims against CSX.3/ The district court dismissed plaintiffs' claims against the Union as barred by the statute of limitations. The plaintiffs argue that the district court erred in concluding that their fair representation claims were barred by the statute of limitations, and that they otherwise have stated claims against the Union. The fact-dependent question of the statute of limitations is irrelevant, since we conclude that even if the plaintiffs had brought their claims in a timely manner, they still failed to state a claim against the Union.

Plaintiffs correctly cite authority demonstrating that the duty of fair representation applies outside the context of claims for breach of a collective bargaining agreement. (*See* Brief of Appellant, at 32-33; Reply Brief, at 11). These cases do not persuade us, however, that the Union here had a duty to represent these plaintiffs in pursuing claims that their rights

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3/ This claim is independent of plaintiffs' claim for breach of contract against the Union. The plaintiffs concede that their breach of contract claim against the Union, and with it the claim for breach of the duty of fair representation with respect to that claim, are barred by the statute of limitations (Appellants' Brief, at 31 n. 14).

under Section 797c were violated. In one of the cases cited by plaintiffs, *Breininger v. Sheet Metal Workers' Int'l Ass'n*, 493 U.S. 67, 110 S.Ct. 424, 107 L.Ed.2d 388 (1989), the Supreme Court stated that the key to a duty of fair representation claim

> is that the union is administering a provision of the contract, something we have always held is subject to the duty of fair representation. "The undoubted broad authority of the union as the exclusive bargaining agent in the negotiation *and administration* of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation."

110 S.Ct. at 437 (emphasis in original; citation omitted). In the present case, the statutory reporting requirements were not related to the negotiation or administration of the collective bargaining agreement, so the Union cannot be charged with a duty to represent its members on claims involving those statutory provisions.4/

4/ Other cases cited by plaintiffs do not support their position. This court in *Storey v. Local 327, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers*, 759 F.2d 517 (6th Cir. 1985), held that the plaintiffs stated a cause of action for breach of duty of fair representation against their union by alleging that the union failed to represent them fairly in the negotiation of a collective bargaining agreement. Similarly, in *Retana v. Apartment, Motel, Hotel & Elevator Operators Union, Local No. 14*, 453 F.2d 1018 (9th Cir. 1972), the court stated that the union had a duty of fair representation because "most of the allegations of this complaint 'concern' matters related to the negotiation or administration of the collective bargaining agreement." *Id.* at 1023.

Plaintiffs contend that the Union should be required "to have sufficient knowledge of statutory provisions granting employees within the bargaining unit" both substantive and procedural rights, and that the Union "abdicated its responsibilities as the appellants' bargaining representative by failing to police CSX's compliance with the Act and by failing to enforce appellants' statutory rights or even to advise them about their rights under the Act." (Brief of Appellant, at 32-33). The legal proposition urged upon us by plaintiffs is a novel one, for which they cite no supporting authority. This proposition, if sanctioned by the courts, would require unions to become familiar with various and sundry statutes that affect their members' rights, regardless of whether they were related to negotiation and administration of the collective bargaining agreement. It would further require unions both to inform their members about those rights and to advocate on behalf of those members to secure those rights, or risk a suit for breach of their duty of fair representation. Finding no support for this concept in the pronouncements of the Supreme Court, we refuse to extend the Union's duty in such a fashion.

Furthermore, we conclude that it would not further national labor policy to compel unions to meet a requirement so vague as having knowledge of any substantive laws which might affect its members. This case clearly demonstrates why this is so. Under plaintiffs' theory, the Union was responsible for interpreting the Act in order to determine that it did provide substantive rights to Union members, and then for informing the particular Union members that their rights may have been violated. Yet, the rights that the union members here assert were based on an admittedly confusing set of statutory provisions which were unrelated to the collective bargaining agreement, which had been interpreted by the RRB for several years as being inapplicable to these union members, and with which the Union had neither any familiarity nor reason to become familiar. Plaintiffs' theory

would elevate the union from a bargaining unit representative to a multi-purpose legal advocate, and we decline to sanction it.

The district court's dismissal of the plaintiffs' claims against the Union is AFFIRMED.

B. Railroad

In their amended complaint, the plaintiffs assert that under section 704 of the Regional Rail Reorganization Act (the "Act"), 45 U.S.C. § 797c, CSX was required to provide to the Railroad Retirement Board (1) a list of former employees who are currently on furlough, and (2) a notice of vacancies for which the railroad expects to accept applications from persons other than its current employees. The plaintiffs claim that as a result of CSX's failure to post its vacancies they lost opportunities to fill those vacancies, and suffered losses of income and seniority rights.

In dismissing the plaintiffs' claims against CSX, the district court first stated that "the statute under which they claim relates only to displaced railroad employees, and in these [sic] the plaintiffs were not displaced. They were furloughed or laid off." The court interpreted the statute as applying only to displaced employees of Conrail or other specific railroads, but not CSX. Second, the district court stated that since the statute called for arbitration of disputes involving the plaintiffs' rights and no arbitration had occurred, it had no jurisdiction to hear plaintiffs' claims. We reverse the district court's determinations on both of these issues. While ordinarily we would address first the issue of subject matter jurisdiction, due to the peculiarities of this case we find it more logical instead to address first the issue of whether these plaintiffs could and did state any claim under Section 797c.

1. Plaintiffs Have Stated a Claim Under 45 U.S.C. § 797c5/

In interpreting a statutory provision, we first examine the statute's language. *Anness v. United Steelworkers of America*, 707 F.2d 917, 920 (6th Cir. 1983). If this language is clear and unambiguous, we can proceed no further in our examination except in very limited situations.6/ *Demarest v. Manspeaker*, ___ U.S. ___, 111 S.Ct. 599, 604, 112 L.Ed.2d 608 (1991).

We first conclude that 45 U.S.C. § 797c is unambiguous in setting forth the vacancy-reporting requirement that is the focus of this dispute. Subsection (c) of Section 797c provides that "*Each railroad* shall timely file with the Board a notice of vacancy with respect to any position for which the railroad intends to accept applications from persons other than current employees of that carrier." (emphasis supplied). The language of this paragraph is not limited to any particular railroad; instead, "each railroad" is required to file notices of vacancies. This broad requirement furthers one of the statute's explicit purposes, set forth in Section 797c(d), that of promoting placement of former railroad employees in open positions. Subsection (d) provides,

> The Board shall, through distribution of copies of the central register (or portions thereof) to railroads and

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5/ Nearly every portion of Section 797c is relevant to our discussion of the issues in this case. For this reason, it is set forth in its entirety in the Appendix to this Opinion.

6/ Although CSX relies on aspects of the statute's legislative history to support its argument, since we find the language of the statute to be unambiguous, we have no occasion to reach the legislative history.

> representatives of classes or crafts of employees and through publication of employment information derived from vacancy notices filed with the Board, promote the placement of former railroad employees possessing requisite skills and experience in appropriate positions with other railroads.

Thus, by the clear language of the statute, the reporting requirement applies to all railroads.

CSX argues that since the Regional Rail Reorganization Act pertains to Conrail, it is logical that the term "employee," as used in Section 797c, applies only to Conrail employees. CSX contends that since Section 797c applies only to Conrail employees, plaintiffs, who are not members of the class the statute seeks to protect, do not have standing to state a claim under that section. We disagree. Section 797c(g) establishes the right of employees to bring actions to enforce their rights under the section. It permits "[a]ny employee" to petition the RRB, and provides for the enforcement of the "employee's rights." The language of Section 797c also indicates that it applies to employees who have been separated from their employment with *any* railroad. Subsection (a) directs the RRB to establish a register containing the names of and information about "persons separated from railroad employment after at least one year of completed service with *a railroad*" who are available for railroad employment. 45 U.S.C. § 797c(a)(1) (emphasis supplied). The statute refers to persons separated from "a railroad" without further limitation; yet, other portions of Section 797c specifically apply to other subsets of employees. First, in subsection (a)(3) the statute requires the Board to place at the top of the register "those former railroad employees entitled to priority under applicable provisions of law, including this chapter." If the only persons

who were entitled to be on the register were former Conrail employees and others with preferential hiring rights, there would be no need for Congress to place them at the top of the register, since these persons would be the only ones on the register. Second, Section 797c(b) specifically identifies another subset of employees, those formerly employed by Conrail. This language strongly suggests that the term "employee," as used in Section 797c was intended to apply to more than just former Conrail workers.

This conclusion is bolstered by the number of times in the Act that the term "employees of the Corporation" is used.7/ This indicates that Congress intentionally differentiated between employees of the Corporation and employees in a more general sense. To read the term "employees" to mean only employees of Conrail would be to render the phrase "of the Corporation," mere surplusage each time it is used in the statute. *See, e.g.*, 45 U.S.C. § 797(a), (c); § 797g(a), (c). When interpreting a statute, the court is to give effect to each word of the statute if at all possible. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1979); *In re Vause*, 886 F.2d 794, 801 (6th Cir. 1989); *Fulps v. City of Springfield*, 715 F.2d 1088, 1093 (6th Cir. 1983). Thus, we conclude that the plaintiffs were part of the class to be protected by Section 797c and have standing to bring an action to enforce their rights under that provision.8/

7/ Employees of "the Corporation" means employees of "Conrail." 45 U.S.C. § 702(5).

8/ CSX also contends that Plaintiffs failed to demonstrate that they "declared their current availability for employment" as required by Section 797c(s)(1), so they have failed to state a claim. Although the Plaintiffs' reporting to the RRB in order to establish eligibility to collect unemployment

(continued...)

2. Jurisdiction of the District Court

As noted above, the district court held that since the dispute involved in this case was subject to mandatory arbitration, but was never arbitrated, the court lacked subject matter jurisdiction to entertain plaintiffs' claims. The procedures that are to be followed to enforce Section 797c rights are outlined in Section 797c(g), which provides,

> Any dispute, grievance, or claim arising under this section, . . . shall be subject to resolution in accordance with the following procedures:
>
> > (1) Any employee with such a dispute, grievance, or claim may petition the Board to review and investigate the dispute, grievance, or claim.
> >
> > (2) The Board shall investigate the dispute, grievance, or claim, and if it concludes that the employees' rights under this section, . . . may have been violated, the dispute, grievance, or claim shall be subject to resolution in accordance with the procedures set forth in section 153 of this title.
> >
> > (3) In the case of any violation of this section, . . . the Adjustment Board (or any division or delegate thereof)

8/ (...continued)
benefits may itself satisfy this requirement, it is unnecessary for us to so hold. Declaration of availability is not a prerequisite to showing standing.

> or any other board of adjustment created under section 153 of this title shall, where appropriate, award such relief, including back pay, as may be necessary to enforce the employee's rights.

Section 153 of Title 45 created the National Railroad Adjustment Board, and established a system for arbitration of disputes between rail employees and their employers.

By its own terms, Section 797c expired on August 13, 1987. Thus, as of that date the RRB ruled that it no longer had the authority to investigate and make findings about alleged violations of the section. Nevertheless, we hold that this statutory sunsetting provision does not leave claimants in the position of these plaintiffs unable to enforce their rights. Section 797c created substantive rights, the violation of which could result in the awarding of relief. The fact that the scheme to enforce those rights has expired does not render the substantive rights a nullity. This proposition has been codified in the general savings clause, 1 U.S.C. § 109, which provides, "The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." *See also United States v. Empire Gas Corp.*, 547 F.2d 1147, 1154-55 (Temp. Emer. Ct. App. 1976), *cert. denied*, 430 U.S. 915, 97 S.Ct. 1326, 51 L.Ed.2d 592 (1977). This savings provision clearly indicates that plaintiffs' substantive rights are to be enforced regardless of the expiration of the particular mechanism provided for their enforcement.

The complaint against CSX filed by these plaintiffs in the district court alleged violations of substantive rights to which plaintiffs were entitled under a federal statute. In general, federal district courts have jurisdiction to entertain suits brought to enforce federal statutory rights. *See* 28 U.S.C. § 1331. In this particular instance, however, Congress had assigned to the RRB the responsibility to investigate and make factual findings on claims relating to violations of employees' rights. Congress also provided a right to have those claims arbitrated if the RRB found that the person's rights may have been violated, and vested jurisdiction in the district courts to review those arbitration decisions. 45 U.S.C. § 153(q). Upon the expiration of Section 797c, the RRB refused to investigate the alleged violations of plaintiffs' rights, because it erroneously interpreted the statute to mean that it did not have the continuing authority under the statute to perform an investigation or make findings. Therefore, eleven of the plaintiffs, all those but Faunce, appeared to have no right to proceed to arbitration.

When plaintiffs brought their claim to federal district court, that court concluded that it did not have jurisdiction to hear plaintiff's claims because they did not follow the appropriate procedures before coming to federal court. The plaintiffs' failure to use this statutorily prescribed procedure, however, was based not on their own choice, but rather on the RRB's erroneous conclusion that it had no authority to entertain their claims.9/ The district court's conclusion that it lacked jurisdiction compounded the RRB's error because its

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9/ Plaintiffs' failure to submit their claims to arbitration does not alter this conclusion. Other than Faunce, the plaintiffs had no right to invoke the procedures of Section 153 because the RRB had not made the preliminary determinations that their rights may have been violated. Thus, their failure to submit their claims to arbitration did not deprive the district court of jurisdiction in this matter.

effect was to permit the Board, by erroneously interpreting the statute, not only to terminate the plaintiffs' rights under that statute, but in addition, to deprive the district court of jurisdiction and, implicitly, to render the Board's own action unreviewable.

Because, as we have now held, the plaintiffs did have substantive rights under the Act, had the RRB been correct that it no longer had the authority to perform the investigation and make the findings prerequisite to plaintiffs' right to pursue their claims in arbitration, the plaintiffs could have asserted a due process claim against the RRB. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (failure of state agency to convene investigatory hearing within procedural time limit did not deprive aggrieved party of the right to have his claim heard); *see also Ruffin v. Division Three, Nat'l R.R. Adjustment Bd.*, 368 F. Supp. 990, 995 (E.D. Pa. 1973) (when Adjustment Board refuses to decide an issue properly presented to it, which would constitute a failure to fulfill the Board's duties, a court may compel the Board to effect a final disposition of grievances) (dicta). In such a suit, plaintiffs could have sought to force the RRB to perform the investigation and make findings as required by the Act. However, the RRB was incorrect; it did have the authority, and indeed the duty, to investigate plaintiffs' claims. Since the RRB had already made factual findings as to plaintiff Faunce, which findings are equally applicable to the remaining eleven plaintiffs, those plaintiffs did not need to compel the RRB to make factual findings. Thus, it was permissible for them to pursue their claim against CSX in the federal district court under 28 U.S.C. § 1331. It would be anomalous indeed if the district court could have jurisdiction to review what the arbitrator decided on plaintiffs' claims, 45 U.S.C. § 153(q), but not have jurisdiction over a decision that deprived the plaintiffs of their right to have their claims arbitrated.

We have essentially concluded that there was only one narrow issue before the district court on plaintiffs' 797c claim: were the plaintiffs entitled to have the RRB determine whether their rights may have been violated. As we explained above, they were so entitled. The record also clearly demonstrates that the RRB's conclusion that plaintiff Faunce's rights may have been violated because of CSX's failure to report vacancies is equally applicable to the other plaintiffs. Therefore, there is no need for the eleven remaining plaintiffs to seek the assistance of the RRB. The only remaining question then, is who must decide the remaining matters with respect to plaintiffs' claims. We conclude that by the terms of Section 797c(g) the plaintiffs' claims are subject to arbitration under the provisions of 45 U.S.C. § 153.

Under Section 797c, once the preliminary determination has been made that a claimant's rights "may have been violated", the statute provides that an adjustment board is to arbitrate the claim. Arbitration is therefore the proper method of resolution of plaintiffs' claims against CSX. In holding that plaintiffs' claims should be remanded to an arbitrator, we rely upon the reasoning of the Eighth Circuit in *Beardsly v. Chicago & North Western Transp. Co.*, 850 F.2d 1255 (8th Cir. 1988), *cert. denied*, 489 U.S. 1066, 109 S.Ct. 1340, 1341, 103 L.Ed.2d 810 (1989). In *Beardsly*, one group of plaintiffs asserted that although they possessed preferential hiring rights under Section 105 of the Rock Island Railroad Transition and Employee Assistance Act, 45 U.S.C. § 1004, the defendant violated that Act by not hiring them. The railroad argued that because the statute that provided for arbitration of Section 1004 claims (45 U.S.C. § 797c(g)) had expired on August 13, 1987, the appellants' right to arbitration ceased to exist. 850 F.2d at 1272. The court of appeals disagreed.

The court reviewed the legislative history of both the substantive provision, Section 1004, and the sunsetting provision, Section 797c(f), and concluded that "the sunsetting provision of [Section 797c] was intended to eliminate the Central Register of Railroad Employment administered by the Railroad Retirement Board (RRB) and not to cut off the right to arbitration for disputes concerning preferential hiring." 850 F.2d at 1272. Although the present case does not involve a dispute over preferential hiring, we find no reason to conclude that the arbitration provision would expire for certain types of claims, but remain extant for others. As the court in *Beardsly* noted, it was the existence of the Register that Congress intended to limit. Thus, the district court should order that an adjustment board hear plaintiffs' claims. *Cf. American President Lines, Ltd. v. S. Woolman, Inc.*, 239 F. Supp. 833, 838 (S.D.N.Y. 1964) (noting the general principle in contract-based arbitration cases that "arbitration of a controversy which arose prior to the expiration of a contract will be enforced after expiration").

Plaintiff Faunce, however, presents a different factual situation from the other plaintiffs. As to him, the RRB had already made and notified him of its final determination that his rights may have been violated. All that remained for him to do was to submit his claim to the Adjustment Board. *See* 45 U.S.C. § 153; *see also Antonioli v. Lehigh Coal & Navigation Co.*, 47 F.R.D. 198, 200-01 (E.D. Pa. 1969) (under Section 153 (first) the employee can prosecute his own claim before the Adjustment Board); *Ruffin v. Brotherhood of Ry. & S.S. Clerks, Freight Handlers & Station Employees*, 314 F. Supp. 1365, 1371 (E.D. Pa. 1970) (same). However, Faunce did not

do so, but came instead into the district court.10/ Therefore, we will REMAND his claim to the district court so that it may determine whether or not the release he executed was valid. If it is valid, his claim will be considered settled and dismissed. If it is not valid, Faunce's claims must be dismissed for lack of jurisdiction. Whether his claim would still be arbitrable under Section 153 is not before us at this juncture.

CSX also argues that the plaintiff's failure to petition the Board before the statutory provisions expired is fatal to their claims. (Appellee CSX's Brief, at 20). Since the substantive rights created by Section 797c did not expire, we reject this contention as too narrow a reading of the statute's remedial provisions. We note, however, that this conclusion does not, as a matter of law, preclude the assertion of laches as a defense. We express no opinion on the laches question as that is a matter for the arbitrator to address.

The parties do not agree on what efforts the plaintiffs made in notifying the Railroad Retirement Board of their complaint against CSX. Plaintiffs assert that each of them made efforts from 1984 through 1987 to inform the RRB that CSX had failed to report its vacancies. CSX contends that each was required to file a written petition to the Board. The district court did not resolve this dispute because it held that plaintiffs failed to state a claim as a matter of law. Because

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10/ Obviously, had Faunce attempted to use the arbitration procedures of Section 153 and been rebuffed by the adjustment board (similarly to the other plaintiffs' being turned away by the RRB) then he could have pursued a claim against the adjustment board to compel them to arbitrate his claim. *See Ruffin v. Division Three, Nat'l R.R. Adjustment Bd.*, 368 F. Supp. 990, 995 (E.D. Pa. 1973) (when Adjustment Board refuses to decide an issue properly presented to it, which would constitute a failure to fulfill the Board's duties, a court may compel the Board to effect a final disposition of grievances) (dicta).

this matter will be remanded for arbitration, we find it unnecessary to resolve this factual dispute. This matter, along with CSX's claims that plaintiffs are barred by laches and the statute of limitations, may be presented to the arbitrator. *See Beardsly*, 850 F.2d at 1273-74.

The district court's dismissal of plaintiffs' claims against CSX is REVERSED and REMANDED for further proceedings in accordance with this opinion.

APPENDIX

§ 797C. Central register of railroad employment

(a) Register

(1) The Railroad Retirement Board (hereafter in this section referred to as the "Board") shall prepare and maintain a register of persons separated from railroad employment after at least one year of completed service from a railroad who have declared their current availability for employment in the railroad industry. The register shall be subdivided by class and craft of prior employment and shall be updated periodically to reflect current availability.

(2) Each entry in the register shall include, or provide access to, basic information concerning the individual's experience and qualifications.

(3) The Board shall place at the top of the register those former railroad employees entitled to priority under applicable provisions of law, including this chapter.

(b) Corporation employees

As soon as is practicable after August 13, 1981, the Corporation shall provide to the Board the names of its former employees who elect to appear on the register and who have not been offered employment with acquiring railroads.

(c) Vacancy notices; warning; civil penalty

(1) Each railroad shall timely file with the Board a notice of vacancy with respect to any position for which the

railroad intends to accept applications from persons other than current employees of that carrier.

(2)(A) As soon as the Board becomes aware of any failure on the part of a railroad to comply with paragraph (1), the Board shall issue a warning to such railroad of its potential liability under subparagraph (B).

(B) Any railroad failing to comply with paragraph (1) of this subsection after being warned by the Board under subparagraph (A) shall be liable for a civil penalty in the amount of $500 for each subsequent vacancy with respect to which such railroad has so failed to comply.

(d) Placement

The Board shall, through distribution of copies of the central register (or portions thereof) to railroads and representatives of classes or crafts of employees and through publication of employment information derived from vacancy notices filed with the Board, promote the placement of former railroad employees possessing requisite skills and experience in appropriate positions with other railroads.

(e) Employment applications

In addition to its responsibilities under subsections (a) through (d) of this section, the Board shall facilitate the filing of employment applications with respect to current vacancies in the industry by former railroad employees entitled to priority under applicable provisions of law, including this chapter.

(f) Expiration

The provisions of this section shall cease to be effective on the expiration of the 6-year period beginning on August 13, 1981.

(g) Resolution of disputes

Any dispute, grievance, or claim arising under this section, section 797b of this title, section 907 of this title, or section 1004 of this title shall be subject to resolution in accordance with the following procedures:

(1) Any employee with such a dispute, grievance, or claim may petition the Board to review and investigate the dispute, grievance, or claim.

(2) The Board shall investigate the dispute, grievance, or claim, and if it concludes that the employee's rights under this section, section 797b of this title, section 907 of this title, or section 1004 of this title may have been violated, the dispute, grievance, or claim shall be subject to resolution in accordance with the procedures set forth in section 153 of this title.

(3) In the case of any violation of this section, section 797b of this title, section 907 of this title, or section 1004 of this title, the Adjustment Board (or any division or delegate thereof) or any other board of adjustment created under section 153 of this title shall, where appropriate, award such relief, including back pay, as may be necessary to enforce the employee's rights.

APPENDIX B

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEONARD F. BARKER, JR., and ISAAC GLOVER,	
Plaintiffs,	
vs.	Civil Action No. 87-CV-70116-DT
THE CHESAPEAKE & OHIO RAILWAY COMPANY,	
Defendant.	

Proceedings had in the above-entitled matter before HONORABLE AVERN COHN, District Court Judge, United States District Court, at Detroit, Michigan, on Monday, October 22, 1990.

APPEARANCES:

REOSTI AND HAYES
925 Ford Building
Detroit, Michigan 48226
(By Ronald Reosti and Barbara Harvey, Esq.)

Appearing on behalf of Plaintiffs
Leonard F. Barker and Isaac Glover

MARY C. O'DONNELL, ESQ.
888 W. Big Beaver Road, Suite 400
Troy, Michigan 48084

Appearing on behalf of CSX Transportation, Incorporated

C. THOMAS WILSON, ESQ.
Suite 2334
One Kennedy Square
Detroit, Michigan 48226

Appearing on behalf of Defendant United Transportation Union

Detroit, Michigan
Monday, October 22, 1990

- - -

THE CLERK: 87-70116 Barker versus C&O

THE COURT: Would all of you give your appearances to the reporter.

MS. HARVEY: Barbara Harvey, one of the attorneys for the Plaintiffs.

MR. REOSTI: Ron Reosti, one of the attorneys for the Plaintiff.

MS. O'DONNELL: Mary O'Donnell on behalf of Defendant CSX.

MR. WILSON: C. Thomas Wilson from the law firm of Nelson, Wilson, and Wilson on behalf of the Defendant United Transportation Union.

THE COURT: This case has been pending since initially January 13, 1987. And what I am about to say is the source of some embarrassment to the Court. I'm going to say it and if anyone wants to take exception to it, they can.

First count in this case appears to be a claim under -- let's see if I can find it here. Title VII of the Omnibus, Budget Reconciliation, at, I believe it is 1982 -- Public Law 97-35. Title VII, Protection of Employees. As I understand claims, Chesapeake & Ohio Railroad workers who are either furloughed or laid off made claim under that statute for reinstatement rights. As I read that statute, there are two problems with the claim. One, the statute under which they claim relates only to displaced railroad employees. And in these the plaintiffs were not displaced. They were furloughed or laid off. And they're asking for reinstatement to their own railroad.

Secondly, the statute was remedial in nature and relates only to Conrail employees who were displaced by virtue of a railroad reorganization and certain other railroad employees who were displaced by other reorganizations or bankruptcy such as the Milwaukee Road and several others. That's number one.

Number two, their statutory rights as I read the statute, let me see if I can get it in full text here, comes either under Section 7 or 3 of the statute or 7 or 4. And the statute expressly requires that resolution of any displaced disputes relating to reinstatement be subject to arbitration. And this Court lacks subject matter jurisdiction to do anything for these persons regardless of who they are or what railroad, how they

were displaced. This Court is simply without jurisdiction in the premises. And that view of the law is consumed by not only *Beardsley*, there is a district court decision some place. And to accept any formulation of the statute which would give these employees rights would mean that every railroad worker in the United States for that period who was either laid off or furloughed would have reemployment rights against his or her own railroad under the statute. And to state the proposition answers the proposition. That's number one.

Number two, to the extent that they claim a cause of action for breach of the collective bargaining agreement or failure to fair representation, their claims are outlawed by the statute of limitation.

* * * *

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEONARD F. BARKER, JR., et al.,

Plaintiffs,

v.

CHESAPEAKE & OHIO RAILWAY CO.,
a/k/a CSX TRANSPORTATION, INC.,
and UNITED TRANSPORTATION UNION,

Defendants.
_____/

ORDER

For reasons on the record on October 22, 1990 this case is DISMISSED. More particularly:

(1) Plaintiffs have acknowledged that the claims of breach of the duty of fair representation and breach of contract were asserted beyond the six month statute of limitation applicable thereto.

(2) The Court lacks subject matter jurisdiction over the claims asserted under § 704 of the Regional Rail Reorganization Act, 45 U.S.C. § 797c,

and alternatively, plaintiffs do not have standing to assert such claims.

SO ORDERED.

/s/ Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: October 30, 1990

Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEONARD F. BARKER, JR., ISAAC GLOVER, TIMOTHY L. REEDY, CARL J. CANNON, KENNETH BEAVER, ROBERT FAUNCE, JAMES KELLIE, PAUL FYFFE, RICKY D. WINANS, STEVEN L. HIGGINBOTHAM, ELBERT REED, DYKE CHRISTIAN, WILLIAM CHARLES and JEFFREY L. DARWISH,

Plaintiffs,

v.

CHESAPEAKE & OHIO RAILWAY CO., a.k.a. CSX TRANSPORTATION, INC. and UNITED TRANSPORTATION UNION,

Defendants.

ORDER

On October 30, 1990, the Court entered an order dismissing this case which stated in part:

(1) Plaintiffs have acknowledged that the claims of the breach of the duty of fair representation and

breach of contract were asserted beyond the six month statute of limitation applicable thereto.

It appears that the Court may have been in error when it said that the plaintiffs acknowledged their fair representation claim was barred by the statute of limitation.

The error is immaterial to the dismissal of the case.

Therefore paragraph (1) of the Order of October 30, 1990 is amended to read:

(1) Plaintiffs have acknowledged that the claim of breach of contract was asserted beyond the six month statute of limitation applicable thereto.

SO ORDERED.

/s/ Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: Feb. 19, 1991

Detroit, Michigan

APPENDIX D

Nos. 91-1260/1279

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD F. BARKER, JR., ET AL.,	
Plaintiffs-Appellants,	
ROBERT J. FAUNCE, ET AL.,	
Plaintiffs,	
v.	ORDER
CHESAPEAKE & OHIO RAILWAY COMPANY, a/k/a CSX TRANSPORTATION, INC.; UNITED TRANSPORTATION UNION,	
Defendants-Appellees.	

BEFORE: GUY, NORRIS and BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX E

RAILWAY LABOR ACT -- 45 U.S.C. § 153

National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided--

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the

organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve, but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise

designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of this title and which represent employees in engine, train, yard or hostling service: *Provided, however*, That each labor

organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however*, That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third division. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however*, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the

parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such

order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however*, That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under

paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however*, That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to

the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) of this section, with respect to a division of the Adjustment Board.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character

specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all

matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

Judicial review - - 45 U.S.C. § 1105.

(a) Special court; exclusive jurisdiction for civil actions

Notwithstanding any other provision of law, the special court shall have original and exclusive jurisdiction over any civil action--

(1) for injunctive, declaratory, or other relief relating to the enforcement, operation, execution, or interpretation of any provision of or amendment made by this chapter or part 2 of the Conrail Privatization Act [45 U.S.C. § 1311 et seq.], or administrative action taken thereunder to the extent such action is subject to judicial review;

(2) challenging the constitutionality of any provision of or amendment made by this chapter or part 2 of the Conrail Privatization Act [45 U.S.C. § 1311 et seq.];

(3) to obtain, inspect, copy, or review any document in the possession or control of the Secretary, Conrail, the United States Railway Association, or Amtrak that would be discoverable in litigation under any provision of or amendment made by this chapter or part 2 of the Conrail Privatization Act [45 U.S.C. § 1311 et seq.]; or

(4) seeking judgment upon any claim against the United States founded upon the Constitution and resulting from the operation of any provision of or amendment made by this chapter or part 2 of the Conrail Privatization Act [45 U.S.C. § 1311 et seq.].

(b) Exclusive review by writ of certiorari to the Supreme Court

A judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States, except that any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of any provision of this subtitle shall be reviewable by direct appeal to the Supreme Court of the United States. Such review is exclusive and any petition or appeal shall be filed not more than 20 days after entry of such order or judgment.

(c) Scope of review of administrative actions

Administrative action under the provisions of or amendments made by this chapter or part 2 of the Conrail Privatization Act [45 U.S.C. § 1311 et seq.] which is subject to review shall be upheld unless such action is found to be unlawful under standards established for review of informal agency action under paragraphs (2)(A), (B), (C) and (D) of section 706, Title 5. The requirements of this subtitle shall constitute the exclusive procedures required by law for such administrative action.

(d) Assignment of additional judges

If the volume of civil actions under subsection (a) of this section so requires, the United States Railway Association shall apply to the judicial panel on multi-district litigation authorized by section 1407 of Title 28 for the assignment of additional judges to the special court. Within 30 days after the date of such application, the panel shall assign to the special court such additional judges as may be necessary to exercise the jurisdiction described in subsection (a) of this section.

APPENDIX F

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 4419
Docket Number 4358

Referee John B. LaRocco

PARTIES TO DISPUTE:	D. G. Fischer Consolidated Rail Corporation
STATEMENT OF CLAIM:	Consolidated Rail Corporation (Conrail) did violate D. G. Fischer's right of first hire under section 703 of the Regional Rail Reorganization Act.
OPINION OF BOARD:	D.G. Fischer (Claimant), a former employee of the Consolidated Rail Corporation (Carrier), asserts a preferential right of hire to two Carrier positions.

I. BACKGROUND AND SUMMARY OF THE FACTS

From June 1, 1978 to June 30, 1981, Claimant occupied a Senior Industrial position at the Carrier's Collinwood Shops in Cleveland, Ohio. As a result of its decision to close Collinwood, the Carrier abolished Claimant's position on June 30, 1981. Since Claimant was not covered by any Collective Bargaining Agreement, he lacked a contractual seniority right to displace to another position.

Beginning in early 1981, Claimant attempted to procure a position comparable to Senior Industrial Engineer. Claimant interviewed for a position with a group studying freight car repairs but, apparently, the Carrier did not offer the position to Claimant. However, the Carrier assured Claimant that it would consider him for any Industrial Engineer position on the system, if and when a vacancy arose. Since 1981, the Carrier has not had any Industrial Engineering vacancies.

Subsequent to July, 1981, the Carrier failed to offer Claimant two vacant positions at Philadelphia. The two positions were Operation Improvement Engineer and Senior Operation Improvement Analyst. Neither of the successful applicants for the position claimed a priority hiring right. Asserting that the Carrier violated his preferential hire rights set forth in Section 703 of the Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. 797b, Claimant commenced proceedings before the Railroad Retirement Board (Retirement Board). Without explanation, the Retirement Board determined that Section 703 applied to the Carrier and it began investigating Claimant's allegation.

The record before us contains the correspondence between the Retirement Board and each party. Relying heavily on his thirty-four years of Industrial Engineering experience, Claimant argued that he was qualified to occupy either of the two positions. Claimant had accumulated nine years of time study experience including one year of time study work with the Carrier. The Carrier's Employee Profile Survey dated April 8, 1981 confirmed Claimant's extensive experience in performing time study projects. When he interviewed for a time study position with the Carrier in June, 1981, the Interviewer allegedly told Claimant that he was over-qualified for the job. In addition, Claimant emphasized that he had developed a sophisticated Operations Computer Model at Republic Steel. The Carrier evaluated Claimant's performance

in March and July, 1980. In March, the Carrier characterized Claimant's performance as "superior." In the July, 1980 appraisal, the Carrier gave Claimant an average performance rating and noted that his reluctance to leave Cleveland hindered his future career advancement. Claimant challenged the authenticity of the July, 1980 performance appraisal. He vehemently denied that he signed the evaluation form and charges that someone forged his signature. Claimant represented to the Retirement Board and reiterated in his submission to us that he was willing to relocate to a Railroad position anywhere in the United States.

The Carrier informed the Retirement Board that Claimant was unqualified for the two positions because he lacked sufficient Time Study experience, was unwilling to relocate outside the Cleveland area and, in the Carrier's judgment, preferred a job that did not require constant traveling. According to the Carrier, Claimant insisted on staying in the Cleveland area raising the inference that Claimant would have declined an offer of employment which would require him to move to Philadelphia. For the Senior Operation Improvement Analyst position, the Carrier required the successful applicant to hold a Master of Science Degree in Industrial Engineering. Since Claimant held only a Bachelor of Science Degree (in business), he failed to meet the minimum qualifications for the position. The carrier also wanted an individual who had comprehensive and specialized knowledge of Railroad simulation theory. Again, Claimant lacked the requisite experience and education. In sum, while Claimant's work during his three years with the Carrier was satisfactory, he simply did not possess the minimum credentials, necessary experience or personal desire to be considered as a candidate for the two Philadelphia vacancies.

After the Retirement Board issued its preliminary determination, the Carrier learned that the Chesapeake and

Ohio Railway Company (C&O) offered Claimant an Industrial Engineer position at Huntington, West Virginia. Claimant accepted the offer. Before his March 1, 1984 starting date, Claimant reneged. Claimant frankly admitted that his wife was unwilling to relocate to Huntington. Thus, the Carrier avers that Claimant's equivocation with regard to the C&O position evinced his unwavering resolve to remain in Cleveland.

On March 8, 1984 the Retirement Board concluded that the Carrier may have violated Claimant's rights under Section 703 of the Regional Rail Reorganization Act. Specifically, the Retirement Board found that: (1) Claimant had raised issues within the Scope of Sections 703 and 704; (2) Claimant had a Section 703(a) preferential hire right for the Operations Improvement Engineer and Senior Operations Improvement Analyst positions; and (3) the Carrier did not violate the Section 704(c) job vacancy reporting provisions. On the same day, the Retirement Board forwarded its findings to the National Mediation Board's Staff Director of Grievances. The Claim was docketed with this Board on July 3, 1984, by the Claimant.

II. RELEVANT STATUTORY PROVISIONS

This dispute involves our first interpretation and application of the Statutory First Right of Hire which is accorded to Railroad workers deprived of employment on certain current and former railroad enterprises. The right is set forth in the Milwaukee Railroad Restructuring Act, the Rock Island Railroad Transition and Employee Assistance Act, and the Regional Rail Reorganization Act of 1973 as amended by the Northeast Rail Services Act of 1981. 45 U.S.C. 907; 45 U.S.C. 1004; and 45 U.S.C. 797b(a). Section 703(a) of the Regional Rail Reorganization Act grants a limited right of preferential hiring to former workers of the Consolidated Rail Corporation. Section 703(a) reads:

> "Any employee who is deprived of employment shall have the first right of hire by any other railroad for a vacancy for which he is qualified in a class or craft (or in the case of a non-agreement employee, for a non-agreement vacancy) in which such employee was employed by the Corporation or a predecessor carrier for not less than one year, except where such a vacancy is covered by (1) an affirmative action plan, or a hiring plan designed to eliminate discrimination, that is required by Federal or State statute, regulation, or Executive order, or by the order of a Federal court or agency, or (2) a permissible voluntary affirmative action plan. For purposes of this section, a railroad shall not be considered to be hiring new employees when it recalls any of its own furloughed employees." 45 U.S.C. 797b(a)

Section 704(g) describes the mechanism for resolving disputes arising under Sections 703 or 704 of the law. Section 704(g) reads:

> "Any dispute, grievance, or claim arising under this section or section 703 of this Act shall be subject to resolution in accordance with the following procedures:
>
> "(1) Any employee with such a dispute, grievance, or claim may petition the Board to review and investigate the dispute, grievance, or claim.

> (2) The Board shall investigate the dispute, grievance, or claim, and if it concludes that the employee's rights under this section or section 703 of this Act may have been violated, the dispute, grievance, or claim shall be subject to resolution in accordance with the procedures set forth in section 3 of the Railway Labor Act (45 U.S.C. 153).
>
> (3) In the case of any violation of this section or section 703 of this Act, the Adjustment Board (or any division or delegate thereof) or any other board of adjustment created under Section 3 of the Railway Labor Act shall, where appropriate, award such relief, including back pay, as may be necessary to enforce the employee's rights." 45 U.S.C. 797C(g).

The jurisdiction and power of this Board is derived from the Railway Labor Act, 45 U.S.C., 151 et seq. The pertinent sections of the Railway Labor Act are Sections 3, First (i) and 2, Second which state:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this

> manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." 45 U.S.C., 153, First (i).
>
> * * * * *
>
> All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." 45 U.S.C., 153, Second. [sic]

III. JURISDICTION

While both parties apparently assumed that our jurisdiction was triggered once the Railroad Retirement Board issued its preliminary findings on March 8, 1984, neither the parties nor the Retirement Board may confer jurisdiction on this Board. To guarantee the orderly resolution of disputes which will stand the test of time, the parties must comply with the jurisdictional yardsticks contained in both the Regional Rail Reorganization Act and the Railway Labor Act. We must address the jurisdictional issue because jurisdiction controls the fundamental power of this Board to issue a final and binding decision. Also, we want to provide former Rail workers and Rail companies with some guidelines for handling Priority Hire Claims. The threshold issue is whether or not we are vested with jurisdiction merely because the Railroad Retirement Board found a potential Regional Rail

Reorganization Act Section 703 violation. 45 U.S.C. 797C(g)(2). For two reasons, we lack jurisdiction to decide the instant claim.

First, the express language of Section 704(g)(2) provides that the claim ". . . shall be subject to resolution in accordance with the provisions set forth in Section 3 of the Railway Labor Act (45 U.S.C. 153)." 45 U.S.C. 797C(g)(2). Section 704(g)(2) clearly incorporates, in total, the dispute resolution machinery in Section 3. Section 3, First (i) of the Railway Labor Act requires the parties to handle Claims ". . . in the usual manner . . ." before filing a Claim with this Board. 45 U.S.C. 153 First (i). The usual handling procedures are most often found in the applicable Collective Bargaining Agreement. Although Claimant is a non-contract employee, the usual handling of Claims includes the duty of the parties to hold a conference on the property prior to submitting the controversy to us. 45 U.S.C., 152, Second. The conference requirement is designed to encourage the parties to reach a mutual accommodation vitiating the need for formal adjudication before this Board. Since Section 704(g)(2) incorporated Section 3 of the Railway Labor Act without any exceptions, our jurisdiction is premised entirely on Section 3 of the Railway Labor Act and we do not have an independent basis for asserting jurisdiction under the Regional Rail Reorganization Act. While Section 704(g)(2) provides that this Board is the ultimate decision maker, our jurisdiction ripens only when the parties have satisfied the condition precedents in Section 3 of the Railway Labor Act. Congress could have (but it did not) either exempted the parties from handling preferential hire claims in the usual manner or expressly permitted the Retirement Board to directly transfer such Claims to this Board. Since the record reveals that the parties did not hold a conference on the property, this Claim has not been handled in the usual manner within the meaning of Section 3, First (i) of the Railway Labor Act. Thus, the

Retirement Board's purely ministerial act of forwarding documents to this Board is insufficient to vest us with jurisdiction.

Second, the policies underlying the usual handling requirements encourage the parties to explore all avenues of possible settlement and promote voluntary dispute resolution. The parties, if they are required to meet in conference, may be able to settle the Claim, especially when the Retirement Board has already determined that a Railroad Company might have undermined a protected worker's preferential hire rights. Automatically transferring the Claim from the Retirement Board to this Board thwarts the parties' attempts to settle the Claim. If a settlement is feasible, the Section 3 procedures give the parties an opportunity, consistent with due process, to compile a complete record containing all relevant evidence before submitting the case to this Board. Adjudicating a Claim immediately after the Retirement Board has issued a possible violation finding prevents the parties from coming forward with additional evidence to support their positions. If we decide a Preferential Hire Claim submitted to us directly from the Retirement Board, we would simply be reviewing precisely the same evidence (and nothing more) on which the Retirement Board premised its possible violation determination. Obviously, Congress envisioned that this Board would independently evaluate Preferential Hire Claims based on a full and complete record. Our role in the adjudication procedure was not limited to duplicating the function of the Retirement Board. Thus, the policy of encouraging the voluntary resolution of disputes dissuades us from carving out a jurisdictional exception to the usual handling prerequisites in Section 3, First of the Railway Labor Act.

We realize that absent a settlement by the parties, our decision will delay, but not unreasonably so, the processing of Claims brought under the Regional Rail Reorganization Act

and like Laws. Assuming the parties are unable to reach a mutually satisfactory disposition of the Claim on the property, an aggrieved worker's rights will be protected because this Board is empowered to issue a make whole remedy in accord with the broad remedial provisions in Section 704(g)(3) of the Regional Rail Reorganization Act. 45 U.S.C. * [sic] 797C(g)(3).

Ordinarily, this Board would dismiss the instant Claim, without prejudice, to permit Claimant to comply with Section 3, First (i) of the Railway Labor Act, and if the Claim is not settled on the property, to later progress the dispute to this Board. However, as discussed below, we must summarily dismiss this Claim with prejudice because Claimant has failed to state a valid complaint under Sections 703 and 704 of the Regional Rail Reorganization Act.

IV. CLAIMANT'S FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED

Claimant is a former employee of the Carrier and he seeks a first right of hire with the Carrier. The question becomes whether the Regional Rail Reorganization Act applies to vacancies arising on the Consolidated Rail Corporation when it is the Carrier's former workers who are asserting the statutory right of preferential hiring.

In its November 18, 1983 letter to Claimant, the Retirement Board determined, without giving any findings or reasons, that the Section 703(a) first right of hire applies to job vacancies on Consolidated Rail Corporation as well as other Railroad Companies. Without any written justification, we cannot speculate on the Retirement Board's basis for reaching its conclusion. Evidently, the Retirement Board decided that the Carrier was subject to Section 703(a) solely on the basis of Claimant's allegations. However, the

Retirement Board did not consider the Arguments raised by the Carrier (relating to the coverage of Section 703) in the record before us. Generally, this Board defers to a ruling issued by a Federal agency. While we have no quarrel with the criteria the Retirement Board used to reach its finding of a possible violation, we must be assured that the Claim as presented states a viable cause of action under Sections 703 and 704 of the Regional Rail Reorganization Act. Since this particular issue was not adequately argued before the Retirement Board, we will consider, *de novo*, whether or not Section 703(a) compels the Carrier to afford its former workers a preferential right of rehire.

Even if this Board were to rule that all of Claimant's factual allegations were true, we would be barred from providing him any relief because Section 703(a) is inapplicable to the Carrier herein. Thus, the Claim is patently defective.

The language in Section 703(a) is plain, unambiguous, and not susceptible to more than one interpretation. Section 703(a) clearly and unequivocally states that any employee ". . . who is deprived of employment shall have the first right of hire by *any other railroad* for a vacancy for which he is qualified . . ." [Emphasis added.] The words "any other railroad" exclude the Consolidated Rail Corporation. If Congress intended to include the Carrier within the Scope of Section 703(a), the word "other" would not appear. Similar language is found in Section 704(d) as well as in the other two statutes giving preferential rehiring rights to former Railroad workers of certain Railroad lines. For example, Section 704(d) provides that the Law is designed to promote the placement of former Railroad employees, ". . .with other railroads." In addition, the legislative history of the 1981 amendments to the Regional Rail Reorganization Act manifests Congress's intent that Preferential Hiring Rights would be accorded to former employees of the Carrier when

they sought employment with Railroads other than the Carrier. Pages S.9060 and S.9061 of the Congressional Record for July 31, 1981 reveal that the Senate and House purposely gave qualified former Consolidated Rail Corporation employees a priority right of rehire to newly established or vacant positions of other Rail carriers. Since one of the reasons for the 1981 amendments to the Regional Rail Reorganization Act was to reduce the Carrier's liability for protective benefits, it is clear that Congress was exempting the Carrier from any duty to rehire its former employees (absent a recall right under a Collective Bargaining Agreement). Thus, Claimant had no preferential right to resume employment with the Carrier under Section 703(a) of the Regional Rail Reorganization Act.

It is not the province of this Board to expand on the express mandate of Congress. We cannot accord workers any more rights than the protective arrangements given them under applicable Agreements, Laws, or Interstate Commerce Commission Orders. Since the Carrier is not "any other railroad" within the meaning of Section 703(a) of the Regional Rail Reorganization Act, Claimant has failed to state a justiciable Claim. Even if we look at the facts most favorable to Claimant, we could not grant him any relief.

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute waived right of appearance at hearing thereon.

A W A R D

Claim dismissed per Findings.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:

/s/ Nancy J. Dever
Nancy J. Dever
Executive Secretary

Dated at Chicago, Illinois, this 20th day of March 1986.